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Via ECF

The Honorable Naomi Reice Buchwald
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Picha v. Gemini Trust Co., LLC,
No. 22-cv-10922-NRB

Dear Judge Buchwald:

I represent Defendants and am following up on matters discussed at oral argument on February 6, 2024 as to Defendants' motion to compel arbitration.

At oral argument, the Court asked about "data logs" that would show when Plaintiffs logged into their Gemini accounts. In response to that inquiry, I am attaching Exhibits A through F. Exhibits A-E are screenshots from Gemini's system that show when the individual user signed up for a Gemini account and the date and time of that user's last sign in. As to the five Plaintiffs, these data show the following last sign in date:

- Brendan Picha: January 6, 2024.
- Max J. Hasting: February 4, 2024.
- Kyle McKuhen: January 7, 2024.
- James Taylor: January 30, 2024.
- Christine Calderwood: January 18, 2024.

As this information suggests, each of the Plaintiffs have logged into their Gemini accounts many times since December 2022. Each time they did, they accepted the most recent terms of the Gemini User Agreement. Given that this point has been raised in litigation in this case, the Plaintiffs cannot be unaware that logging in constitutes assent. Exhibit F lists the specific dates each Plaintiff has logged in (and the number of times on those dates) between January 1, 2022 and February 7, 2024.

As relevant to the pending motion, the User Agreement was amended on December 14, 2022 and notice was sent on December 15, 2022. Since after that date, the individual Plaintiffs

have logged in the following number of times:

- Brendan Picha: 15 logins.
- Max J. Hasting: 101 logins.
- Kyle McKuhen: 21 logins.
- James Taylor: 44 logins.
- Christine Calderwood: 54 logins.¹

These data only further confirm the Plaintiffs' agreement to the terms of the User Agreement. As Plaintiffs conceded at oral argument, the arbitration clause in the User Agreement is broad enough to cover all issues in dispute in this case. Accordingly, the motion to compel arbitration should be granted.

As to the issues raised in Plaintiffs' letter dated February 7, 2024 we will respond only briefly, as that letter is improper and the briefing on the pending motion is closed.

First: Defendants did not make "new arguments" to which the Plaintiffs did not have a chance to respond. All arguments made and discussed at the hearing were based on documents in the record, most of which were submitted by the Plaintiffs.

Second: there is nothing in Plaintiffs' letter that could not have been said during oral argument. Making points after argument has ended—such as Plaintiffs seek to do—only prolongs the matter and invites back and forth. That is why submissions such as Plaintiffs' letter should be rejected.

Third: in any event, as Your Honor observed at oral argument, the issue of whether Plaintiffs agreed to specific amendments to the Master Digital Asset Loan Agreement and the Earn Program Terms (they did) is a red herring, for two reasons: (1) as noted above, everything is governed by the User Agreement; and (2) even if one amendment were not agreed that would just mean that the prior agreement controlled.

¹ There was a typo in the information previously submitted to the Court regarding Plaintiff Calderwood. Previously, we stated that following the amendment she first logged in on December 16, 2022. She actually logged in four times on December 15, 2022.

For the reasons stated in Defendants' briefing and at oral argument, the motion to compel arbitration should be granted.

Respectfully submitted,

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By: /s/ John F. Baughman

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